

File Name: 05a0350p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ALFRED L. DiCENZI,

Petitioner-Appellant,

v.

NORMAN ROSE, Warden,

Respondent-Appellee.

No. 04-3571

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 03-00602—Ann Aldrich, District Judge.

Submitted: July 27, 2005

Decided and Filed: August 17, 2005

Before: MOORE and COLE, Circuit Judges; and WISEMAN, District Judge.*

COUNSEL

ON BRIEF: Carlos Warner, John T. Martin, Cleveland, Ohio, for Appellant. Stuart A. Cole, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

OPINION

R. GUY COLE, JR., Circuit Judge. Petitioner-Appellant Alfred DiCenzi appeals the district court's dismissal of his habeas petition on the ground that the petition was not timely filed. Following a guilty plea to vehicular homicide, DiCenzi was given the maximum sentence under Ohio law, but claims he was never informed by either the trial court or his attorney that Ohio affords those sentenced to a maximum sentence a non-waivable right to a direct appeal of their sentences. When DiCenzi finally became aware of this right, he filed a motion for delayed direct appeal, but this motion was denied by the Ohio appellate courts. He then filed a habeas petition in federal district court, alleging that his constitutional rights had been violated both by the trial court when it did not inform him of his right to appeal, and by the state appellate court when it refused to hear his delayed appeal. The district court found that the petition was untimely, and dismissed it without reaching the merits. Because we find that the portion of the petition relating to the Ohio appellate courts' decisions was timely, and because we find that the district court failed to determine

* The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

conclusively whether DiCenzi was diligent during the time when he claims to have been unaware of his appeal rights, we **VACATE** the district court's dismissal of the petition and **REMAND** for further proceedings consistent with this opinion.

I.

On May 27, 1999, in the Cuyahoga County Court of Common Pleas, DiCenzi pleaded guilty to aggravated vehicular homicide and aggravated vehicular assault. He was sentenced to five years' imprisonment on the vehicular homicide count and eighteen months on the vehicular assault count, to be served consecutively. This constituted the maximum possible sentence for these convictions, and thus under Ohio law the sentencing judge was required to make certain specific factual findings and inform DiCenzi of his right to an appeal of his sentence despite his guilty plea. Ohio Rev. Code §§ 2953.08(A)(1)(b); 2953.08(A)(4). At sentencing, however, the trial judge did not inform DiCenzi of his right to appeal his sentence. J.A. 167-72 (complete sentencing transcript).

Eight months later, in February 2000, DiCenzi's counsel filed a motion for judicial release in which he argued that good behavior rendered DiCenzi eligible for probation. This motion was denied on April 14, 2000. On March 13, 2001, DiCenzi filed a *pro se* motion to merge his two convictions for sentencing purposes, to avoid duplicate punishment for the same acts. No court appears to have acted on this motion. Then, in August 2001, DiCenzi contacted the Cuyahoga County Public Defenders' office ("Public Defender"), who informed him of his right to appeal a maximum sentence. As a result, DiCenzi immediately filed a motion for leave to file a delayed appeal of his sentence on August 23, 2001. This motion was denied by the Ohio Court of Appeals on September 25, 2001.

At this point, the Public Defender independently decided to investigate the case. After examining the sentencing transcript and finding that DiCenzi had never been notified of his right to appeal, the Public Defender accepted representation of DiCenzi and filed a motion for reconsideration in the Cuyahoga County Court of Appeals on October 5, 2001. The motion was denied without opinion on October 24, 2001. The Public Defender then filed a motion to file a delayed appeal in the Ohio Supreme Court on November 16, 2001, arguing that DiCenzi had been denied due process by the state's failure to grant him the right to a delayed appeal when he had been unaware of his right to appeal prior to August 2001. Though this motion was granted, the Ohio Supreme Court later dismissed the appeal as not involving a substantial constitutional question or a matter of great public interest.

DiCenzi, still represented by the Public Defender, then filed a petition for writ of habeas corpus in federal district court, alleging: (1) a Sixth Amendment violation arising from his attorney's failure to notify him of his appeal rights; and also three due process violations arising from (2) the trial court's failure to afford him the usual protections of Ohio law in imposing a maximum sentence, (3) the trial court's "failure to advise him of his appellate rights," and (4) the state appellate court's "refus[al] to allow him to file a delayed appeal." A magistrate judge recommended dismissal of the petition, finding both that the petition was not timely filed and that equitable tolling was not warranted. Over DiCenzi's objections and after a *de novo* review of the record, the district court dismissed the petition as untimely for effectively the same reasons as those found in the magistrate judge's recommendation, but granted a certificate of appealability as to the timeliness issue. The Public Defender timely appealed on DiCenzi's behalf.

II.

A. *Standard of Review*

Since the only issue on appeal is whether the district court properly calculated the timeliness of DiCenzi's habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2244(d)), we review the district court's interpretation of the statute *de novo*. See, e.g., *Miller v. Collins*, 305 F.3d 491, 493-94 (6th Cir. 2002). The relevant AEDPA statute of limitations is as follows:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The burden of proving that the statute of limitations has expired falls upon the party asserting the defense; in a habeas case, this burden thus falls on the government. See, e.g., *Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002).

DiCenzi's petition raised four grounds for granting a writ of habeas corpus: (1) a Sixth Amendment violation arising from his attorney's failure to notify him of his appeal rights; and also due process violations arising from (2) the trial court's failure to afford him the usual protections of Ohio law in imposing a maximum sentence, (3) the trial court's "failure to advise him of his appellate rights," and (4) the state appellate court's "refus[al] to allow him to file a delayed appeal." Claims (1) through (3) deal with matters that occurred at sentencing, and claim (4) deals specifically with a decision of the Ohio Court of Appeals. We will consider this appeal-based claim first, and then proceed to evaluate the sentencing-based claims.

B. *Claim Based on the Ohio Court of Appeals' Denial of Delayed Appeal*

The Ohio Court of Appeals denied DiCenzi's motion for delayed appeal on September 25, 2001. DiCenzi had 45 days from this date to continue his direct appeal in the Ohio Supreme Court, or until November 9, 2001. Ohio Sup. Ct. R. II § 2(A)(1)(a). The Public Defender did file a motion for reconsideration in the Court of Appeals during this time, and that motion was denied on October 24, 2001; however, motions for reconsideration do not extend the time allowable for petitioning the Ohio Supreme Court. Ohio R. App. P. 26(A). DiCenzi did not file a motion to appeal in the Ohio Supreme Court until November 16, 2001, seven days after the deadline for his direct appeal. Therefore, under 28 U.S.C. § 2244(d)(1), the AEDPA "clock" began running on

November 9, 2001. 28 U.S.C. § 2244(d)(1)(A) (initiating the one-year AEDPA requirement upon the expiration of the time for seeking direct review).¹

In DiCenzi's November 16 motion, he presented, in accord with Ohio procedural rules, reasons why the Ohio Supreme Court should hear his appeal despite the fact that the applicable time limit for direct appeals had ended. Such a motion for delayed appeal, even if granted, does not restart the statute of limitations, but if properly filed, it does toll the statute during the time the motion was pending. *See, e.g., Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001) (holding that motions for delayed appeal toll the AEDPA statute of limitations under 28 U.S.C. § 2244(d)(2), but that such motions are *not* part of the direct appeal for the purposes of 28 U.S.C. § 2244(d)(1)). Accordingly, the AEDPA clock was stopped, with seven days elapsed, as of November 16, 2001, pending the Ohio Supreme Court's consideration of DiCenzi's motion.

On December 19, 2001, the Ohio Supreme Court granted DiCenzi's motion for leave to file the appeal, and ordered the parties to brief the jurisdictional merits of the appeal. On April 3, 2002, the Ohio Supreme Court concluded that DiCenzi's claim did not merit Ohio Supreme Court jurisdiction because no significant constitutional question was presented. However, the fact that the appeal itself was ultimately denied on its jurisdictional merits does not alter the fact that DiCenzi's AEDPA statute of limitations was tolled during the consideration of his motion, once it was accepted for filing. *See Bonilla v. Hurley*, 370 F.3d 494, 497 (6th Cir. 2004) (distinguishing between the denial of a motion to file a delayed appeal in the Ohio Supreme Court, a state procedural decision that would preclude tolling, and the granting of the motion to file the appeal but subsequent dismissal on the jurisdictional merits of the case, a decision on the merits that would not preclude tolling). The statute of limitations was thus tolled until the April 3, 2002 decision of the Ohio Supreme Court. Further, that court's decision not to hear DiCenzi's appeal, like all decisions of states' highest courts, could have been appealed to the United States Supreme Court. Following the April 3, 2002 decision, DiCenzi thus had an additional 90 days' worth of tolling in order to petition for certiorari, whether or not he actually did so. *See, e.g., Abela v. Martin*, 348 F.3d 164, 172-73 (6th Cir. 2003) (*en banc*).

Accordingly, 90 days after April 3, 2002, or as of July 2, 2002, the AEDPA clock began running again. From this time, DiCenzi had one year minus seven days to file his federal habeas claim, or until June 25, 2003. His habeas petition was in fact filed on April 3, 2003. Accordingly, as least as to his claim that the Ohio Court of Appeals denied him due process when it denied his motion for delayed appeal, DiCenzi's petition was timely under AEDPA, since the petition was filed 83 days before the expiration of the statute of limitations. Because the district court incorrectly determined that DiCenzi's claim regarding the state appellate court's decision was untimely, we **VACATE** the district court's ruling as to the timeliness of this claim, and **REMAND** for consideration of the merits of the claim.

C. Claims Based on Errors at Sentencing

DiCenzi's three other claims, that he was (1) denied his Sixth Amendment rights when his counsel was ineffective by not informing DiCenzi of his appeal rights; and that he was denied due process when the district court (2) sentenced DiCenzi to an illegal sentence under Ohio law, and (3)

¹Because we find the petition timely even without adding 90 days for United States Supreme Court review of the Ohio Court of Appeals's decision, *see infra*, we express no opinion on whether the addition of such a 90-day period is appropriate when one fails ever to file a direct appeal in the state's highest court. *See Abela v. Martin*, 348 F.3d 164, 172-73 (6th Cir. 2003) (*en banc*) (tolling AEDPA clock for 90 days from final decision of a state court). *But see* 28 U.S.C. § 1257 (allowing Supreme Court jurisdiction only over appeals from "the highest court of a state in which a decision could be had"). Thus we assume, *arguendo*, that DiCenzi's "clock" began running on November 9, 2001, and not 90 days later.

failed to inform DiCenzi of his right to appeal despite his guilty plea, all relate to events that took place on June 30, 1999. Since there was no timely filed direct appeal, DiCenzi's sentence became final on July 30, 1999, and unless another provision of 28 U.S.C. § 2244(d)(1) applies, under 28 U.S.C. § 2244(d)(1)(A), he had one year from this date to file a habeas petition. Obviously, even assuming that all of his later actions tolled the statute for certain periods of time, DiCenzi's habeas petition, filed on April 3, 2003, was not filed within one year of July 30, 1999. Accordingly, if the statute of limitations did indeed begin running on that date, DiCenzi's petition was not timely filed.

The main thrust of the non-equitable-tolling portion of DiCenzi's claim is that he could not have known about his right to a direct appeal of his maximum sentence until he spoke to the Public Defender in the summer of 2001, and thus that the statute of limitations on these claims should have started running only at that time, under 28 U.S.C. § 2244(d)(1)(D). This section of AEDPA starts the statute of limitations running on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." *Id.* Despite DiCenzi's explicit argument in his petition that he could not have reasonably known about his appeal rights before he went to the Public Defender, the district court did not consider what diligence DiCenzi reasonably could have exercised, but rather simply concluded that the AEDPA clock began running on July 30, 1999, 30 days following the imposition of DiCenzi's sentence. *See* D. Ct. Op. at 3-4. DiCenzi argues that he was indeed duly diligent during the time between June of 1999 and August of 2001, and thus that the statute should not have started running until August 2001 when he was informed by the Public Defender that he had the right to an appeal.

Of course, during all this time, had DiCenzi merely inquired of a court or a public defender regarding whether he had the right to an appeal, he could have found out that he did. He argues, however, that it is not reasonable to expect a defendant who pleaded guilty to be aware of mandatory statutory appeal rights from the sentence imposed, especially when neither the court nor his attorney at sentencing informed him of any such rights. In support of this argument, DiCenzi cites *Granger v. Hurt*, 90 Fed. Appx. 97, 99-101 (6th Cir. Jan. 23, 2004) (unpublished opinion), wherein an Ohio prisoner (Granger) had been told by his attorney that the attorney would appeal Granger's conviction. The attorney then failed to do so, and Granger did not discover this failure until he called the attorney to check on the status of his appeal two months after the deadline for filing the appeal had passed. The district court held that the proper date for starting the statute of limitations was the deadline for filing a notice of appeal of his sentence, since Granger *could* have discovered his attorney's failure on that date. We reversed, holding that the district court's decision "ignores the reality of the prison system and imposes an unreasonable burden on prisoners seeking to appeal," and noting that § 2244(d)(1)(D) "does not require the maximum feasible diligence, only 'due,' or reasonable, diligence." *Granger*, 90 Fed. Appx. at 100 (citing *Wims v. United States*, 225 F.3d 186, 190 n.4 (2d Cir. 2000)); *see also, e.g., Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004) (evaluating a prisoner's due diligence in investigating trial errors, and noting the difficulties inherent in the prison environment); *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002) (same). Finding that "the two months that Granger waited before inquiring about his appeal was, under the circumstances, not unreasonable," we held that Granger had exercised due diligence and thus that the AEDPA statute of limitations began running on the date he learned from his attorney that the appeal had not been filed. *Granger*, 90 Fed. Appx. at 100.

Accordingly, as noted by the Second Circuit,

The proper task in a case such as this one is to determine when a duly diligent person in petitioner's circumstances would have discovered [his right to an appeal]. After that date, petitioner was entitled to further delay (whether in actually making the discovery, or in acting on a previously made discovery, or for any other reason whatsoever), so long as he filed his petition within one year of the date in which the discovery would have been made in the exercise of due diligence.

Wims, 225 F.3d at 190 (footnotes omitted). In the instant case, the district court simply did not develop a record as to whether DiCenzi was duly diligent for statutory purposes. Accordingly, the record does not reflect what information DiCenzi had between July of 1999 and August of 2001. Indeed,

[a]s an appellate court, we cannot say precisely when, in exercising due diligence, [a defendant] would have discovered his [right] to appeal. This is so because the date on which the limitations clock began to tick is a fact-specific issue the resolution of which depends, among other things, on the details of [a defendant's] post-sentence conversation with his lawyer and on the conditions of his confinement in the period after [sentencing].

Wims, 225 F.3d at 190-91 (citing *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000) (taking into account “the realities of the prison system” in determining due diligence)); *see also* cases cited *supra* at 5 (involving detailed factual analyses of each defendant's circumstances). Absent such information, we can only speculate whether DiCenzi exercised due diligence.

It is worth noting that the State relies significantly on the fact that, in his motion for delayed appeal to the Ohio Court of Appeals, DiCenzi stated that he did “not recall having been advised, either by counsel or by the trial judge of his appellate rights — if in fact, defendant was so advised, he failed to comprehend the trial court's advice in the wake of his having just received maximum consecutive terms of imprisonment totaling 6 ½ years.”² DiCenzi thereafter obtained a copy of the sentencing transcript, included in the record before the Ohio Supreme Court and the district court, in which it is clear that he was not advised of his right to appeal. Further, DiCenzi has always maintained that he was unaware of his appeal rights — in his traverse DiCenzi was explicit in stating that he had not been informed of his right to appeal by either the sentencing court or his counsel at sentencing. Remand will allow the district court to determine both (a) when DiCenzi first learned of his right to appeal, and (b) when a reasonably diligent person in DiCenzi's position could be reasonably expected to learn of his appeal rights. *Wims*, 225 F.3d at 190-91.

The burden on remand, as in all cases regarding civil statutes of limitations, will fall on the party asserting that the limitations period has expired — here, this party is the government. *See, e.g., Griffin*, 308 F.3d at 653. While it is true that we stated in *Griffin* that “[i]n the habeas context, the party asserting that the statute has run will usually be able to meet this burden by pointing to materials already before the district court, namely, by pointing out that the petition itself was filed after the statute had run,” *id.*, *Griffin* did not involve a dispute over when the statute began to run, but instead involved a dispute over when the petition was filed. Further, the *Griffin* court was careful to state only that the party asserting the defense will *usually* be able to meet the burden by citing to materials already before the district court.

Here, it is not clear when the statute began running. The State notes the long periods of time during which DiCenzi apparently took no action, and the fact that his habeas petition was not filed until just over four years after his sentence became final. DiCenzi highlights both the sentencing transcript, in which there is an absence of any notice of appeal rights, and his repeated pleadings noting that he was never informed of his right to an appeal. The district court never reached the issue of diligence for the purposes of 28 U.S.C. § 2244(d)(1)(D), and thus did not weigh this evidence with regard to the statutory timeliness of DiCenzi's petition. As an appellate court, absent

²The district court also relied on this statement in denying DiCenzi equitable tolling. However, because we do not reach the equitable tolling issue, *see infra*, we express no opinion as to how such a prior statement should affect an equitable tolling claim. Suffice it to note that the district court did not rely on this statement in finding that, “[a]bsent equitable tolling, DiCenzi's petition is untimely under AEDPA.” Of course, on remand, the district court may consider this evidence, along with any other evidence, in determining DiCenzi's diligence for statutory purposes.

factual findings below, we cannot ourselves determine what DiCenzi knew or what a reasonable person in DiCenzi's position might reasonably be expected to do. "We can, however, say that the [several month period during which DiCenzi did not have some sort of motion pending that would have tolled the statute of limitations] is not so clearly unreasonable [for a prisoner in the position DiCenzi claims he was in] that it plainly appears from the face of appellant's petition and supporting papers that he is barred from habeas relief. . . . Accordingly, the district court's dismissal of appellant's petition cannot stand." *Wims*, 225 F.3d at 190-91.

We therefore **VACATE** the judgment of the district court with regard to the sentencing-based claims, and **REMAND** for a determination of when a defendant in DiCenzi's position, acting with due diligence for AEDPA statutory purposes, would have discovered his right to an appeal. The period of time between July 30, 1999 and this date should be added to any periods of time thereafter when DiCenzi's actions would have tolled the statute of limitations. If, after subtracting this total from the time between July 30, 1999 and the filing of the petition on April 3, 2003, the remaining time equals more than one year, then DiCenzi's petition was not timely filed under 28 U.S.C. § 2244(d)(1)(D). DiCenzi also requests an evidentiary hearing in order to introduce additional evidence regarding his diligence. The district court, of course, may only grant such a hearing in a habeas case if the dictates of 28 U.S.C. § 2254(e) are satisfied, a condition that is more properly addressed by the district court in the first instance.

D. Other Claims

DiCenzi also disputes the district court's conclusion that he is not entitled to equitable tolling. However, on remand, it may be found that DiCenzi was duly diligent, for statutory purposes, for a portion of the time at issue. Such a finding could affect any equitable tolling analysis, and we therefore need not address this issue at this time. Further, though DiCenzi does not assert that he is actually innocent of the crime for which he was convicted, on appeal he does argue the merits of his claim that he is somehow "actually innocent" of the *sentence* imposed upon him. The district court never reached the merits of the petition, so this issue simply is not before us now.

III.

For the preceding reasons, we **VACATE** the district court's dismissal of DiCenzi's petition and **REMAND** for proceedings consistent with this opinion.